STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 4, 2003
v	No. 240343 Charlevoix Circuit Court
THOMAS ARYON SHULICK, Defendant-Appellant.	LC No. 01-059009-FC

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of second-degree murder, MCL 750.317. The trial court sentenced defendant to thirty to fifty years in prison. Defendant now appeals as of right. We affirm defendant's conviction, but remand for resentencing.

This case arises out of the stabbing death of the victim Scott Cook. It is undisputed that the victim and defendant, who were not acquaintances of one another, had both consumed substantial quantities of alcohol before the incident. On the evening of April 29, 2001, the victim and a group of acquaintances traveled on four different boats to the marina in Charlevoix. After a night of drinking and socializing, the victim and several others were sitting on one of the boats docked in the marina when defendant approached. After being asked to leave, an altercation ensued between one of the victim's friends and defendant. Defendant left and then returned to the dock and was again asked to leave. Defendant then proceeded to run back to his apartment, which was only a few blocks away, grab a knife and return to the marina. Once back at the marina, defendant began to apologize for the earlier confrontation, and the victim, who had gone back to his own boat by this time, got off his boat and approached the victim. Apparently, the victim then escorted defendant off the dock and defendant stabbed the victim.

Defendant first argues that the trial court erred in failing to instruct the jury on manslaughter. Claims of instructional error are reviewed de novo. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

A trial court must instruct the jury concerning the applicable law, and fully and fairly present the case to the jury in a comprehensible manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). MCL 768.32(1) permits instructions only on necessarily included lesser offenses, not cognate lesser offenses. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). An instruction on a

necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and it is supported by a rational view of the evidence. *Cornell*, *supra* at 357; *Reese*, *supra* at 446. The offenses of voluntary and involuntary manslaughter are necessarily included lesser offenses of murder. *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). Therefore, an instruction on voluntary and involuntary manslaughter must be given if a rational view of the evidence supports it. *Id*.

To show voluntary manslaughter, the prosecution must show that the defendant "killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, *supra* at 535, citing *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation necessary to mitigate a homicide from murder to manslaughter is "that which causes the defendant to act out of passion rather than reason." *Pouncey*, *supra* at 389, citing *People v Townes*, 91 Mich 578, 590; 218 NW2d 136 (1974). In other words, the provocation must be that which would cause the reasonable person to lose control. *Id*

A review of the evidence establishes that none of the elements necessary for a finding of voluntary manslaughter are present in this case. While it is undisputed that defendant had been beaten up by one of the victim's friends, the evidence establishes that after this altercation, defendant went back to the dock once more and then ran to his apartment, retrieved a knife, and went back to the marina. While defendant does not completely remember the stabbing, he did testify that the victim did nothing to deserve the stabbing. Defendant's decision to go to his apartment and retrieve a knife refutes any suggestion that he acted out of passion. A sufficient time had passed to constitute a "cooling-off period." There is no evidence that defendant was compelled to go back to the marina; he could have remained at his apartment. A rational view of the evidence does not support a voluntary manslaughter instruction. Therefore, the trial court did not err in failing to give the instruction.

"Involuntary manslaughter is the intentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza*, *supra* at 536. To prove gross negligence amounting to involuntary manslaughter, the prosecution must establish: (1) the defendant's knowledge of a situation requiring the use of ordinary care and diligence, (2) the defendant's ability to avoid the resulting harm by ordinary care and diligence, and (3) the defendant's failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *People v Albers*, ___ Mich App ___; ___ NW2d ___ (Docket No 236882, issued September 23, 2003), slip op, p 2, citing *People v McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997).

Here, after encountering the victim and his group of friends, defendant intentionally went back to his apartment and retrieved a knife. There is no evidence that the stabbing occurred from gross negligence. There is no evidence that the stabbing occurred during a struggle with the victim. The forensic pathologist testified that the wound was the result of a forceful thrust, not a tentative jab of the knife. The mere fact that defendant does not remember why or how he stabbed the victim does not warrant a finding of involuntary manslaughter. Under the

circumstances, a rational view of the evidence does not support an involuntary manslaughter instruction. Therefore, the trial court properly refused the instruction.

Regardless, harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *Cornell, supra*. Where, as here, the error has been preserved by defendant's request for the lesser included instructions, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *Cornell, supra* at 364, citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The reliability of the verdict is undermined when the evidence "clearly supports the lesser included instruction, but the instruction is not given." *Cornell, supra* at 365.

As addressed, *supra*, defendant intentionally went to his apartment and retrieved a knife. It was defendant who injected a weapon into a situation that had apparently dissipated by the time defendant returned. Defendant admits that the victim did nothing to him and that he does not know why he stabbed the victim. Under the circumstances, it is not more probable than not that the failure to give the requested manslaughter instructions undermined the verdict.

Defendant next argues that he is entitled to be resentenced because the trial court erroneously scored the sentencing guidelines and failed to articulate sufficient substantial and compelling reasons to deviate above the recommended minimum sentence range.[1] In construing the legislative guidelines, a court must discern and give effect to the Legislature's intent, and the statutory language should be given its plain meaning and construed in context. *People v Lippett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002). The sentencing court has discretion in determining the number of points to be scored under the guidelines provided there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id*., quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). If the minimum sentence imposed was within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring guidelines or absent inaccurate information relied on in determining the defendant's sentence. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

Defendant first contends the trial court erred in scoring twenty-five points for offense variable (OV) 9. OV 9, MCL 777.39, provides for the scoring of ten points if there are between two and nine victims, and twenty-five points if there are ten or more victims. The court should "count each person who was placed in danger of injury or loss of life as a victim." MCL 777.39.

The victim's boating group consisted of ten people. It is undisputed that at the time defendant approached the dock, six of the individuals from the group had already gone to their respective boats, and only four individuals, including the victim, remained on the boat that defendant approached. Defendant, therefore, claims that if there were any victims other than

[1] Because the instant offense occurred after January 1, 1999, the legislative guidelines apply to defendant's sentence. MCL 769.34.

Scott Cook, only those individuals who were on the boat when defendant approached could be considered "victims." We agree.

Defendant was upset with the group of people he encountered at the dock – a group that consisted of only four people. Defendant was aware of and upset with only those four people he met on that boat. The mere fact that the victim's boating party consisted of ten people does not warrant a finding that all ten people were victims of defendant's attack. In assigning twenty-five points to this variable, the trial court noted, that any of the people on the four boats within the victim's party could have come out of their boats if they heard defendant approach. However, such a finding is too broad and would warrant a finding that anyone in defendant's path from his apartment to the marina could have come out when they heard defendant. Under the circumstances, we find that assigning twenty-five points to OV 9 requires too broad an interpretation of OV 9. Accordingly, the trial court should have assigned only ten points to OV 9.

Defendant next contends that the trial court erred in scoring ten points to OV 19. OV 19, MCL 777.49, provides for the scoring of ten points when"[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." In *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002),[2] this Court interpreted this offense variable and found that "interference with" the administration of justice is equivalent to "obstruction of" justice, which this Court held was limited to an effort to undermine or prohibit the judicial process. *Id*. at 597-598. In that case, the defendant attempted to evade OUIL charges by switching seats with the passenger of his vehicle and refusing an immediate blood-alcohol content test. The Court held that a defendant does not "engage in any conduct aimed at undermining the judicial process" where he tries to evade the charges altogether. *Id*.[3]

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[2] The Supreme Court granted the prosecution leave to appeal in this case on July 3, 2002.

[3] We note that one week after *Deline*, this Court issued its decision in *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003). In that case, the Court was asked to address the issue whether ten points could be assigned under OV 19 for the defendant's underlying assault conviction when ten points were already assigned to the defendant's sentence for his fleeing and alluding conviction, which arose out of the same incident. This Court found that "where the crimes involved constitute one continuum of conduct, . . ., it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing range with respect to each offense." *Id*. at 641. Therefore, this Court found that ten points could be allocated for both convictions. In rendering this decision, however, this Court did not address the Court's earlier decision in *Deline*. This Court was not asked to address whether the defendant's conduct in fleeing the police warranted the imposition of ten points under OV 19; rather it was asked only to address whether it was proper to use the same conduct to impose points under the same variables for multiple convictions. Therefore, while this Court upheld a sentence in which ten points was imposed for OV 19 for the defendant's flee from police, because the Court did not specifically address whether ten points should be imposed for fleeing the police under OV 19 and because the Court did not address the earlier *Deline* decision, we do not read the *Cook* decision as requiring that ten points be allocated to OV 19 for conduct in which the defendant attempts to flee the police or evade capture and subsequent charges.

Here, the trial court assigned ten points to OV 19 for defendant's conduct in hiding from the police when they went to his apartment hours after the stabbing. The trial court did not find that defendant attempted to obstruct justice by doing things such as requesting witnesses to lie or destroy evidence; instead, the trial court specifically stated that "to avoid apprehension is to interfere or attempt to interfere with the administration of justice." However, in *Deline*, this Court determined that it is improper to assign ten points to OV 19 for conduct that involves the attempt to evade charges altogether. Because defendant's conduct appears more an attempt to evade apprehension and the subsequent charges altogether, as opposed to an attempt to undermine the judicial process, we find the trial court erred in assigning ten points to OV 19.

Defendant was assigned 0 points for his PRV score and 106 points for his OV score. Thus, defendant was placed at PRV level A and OV level III, which set his minimum guidelines range at 162 to 270 months or life. As defendant notes, had the trial court assigned only ten points to OV 9 and zero points to OV 19, defendant's OV score would have been 81, which would have lowered the OV level to II and altered the recommended minimum guidelines range from 162 to 270 months or life to 144 to 240 months. Because correction of the court's error results in a lowering of defendant's minimum guidelines range, the court's error cannot be considered harmless unless the trial court would have departed from the guidelines regardless of the score.

Even overlooking the errors in scoring, the trial court departed from the recommended guidelines of 162 to 270 months or life when it sentenced defendant. The trial court sentenced defendant to 360 months (30 years) to 50 years. While the court gave reasons for its departure, it did not state that it would have rendered the same sentence regardless of how it scored the variables to determine defendant's recommended sentence. Thus, we are unable to discern from the record if the trial court would have rendered the same sentence under different scoring conditions and different guidelines. While it is likely that the court would nonetheless have departed from the recommended guidelines, we are unable to discern whether it would have departed to the same degree. Therefore, we find remand for resentencing is necessary to allow the trial court to sentence defendant under the correct guidelines. Because remand for resentencing under the corrected guidelines is necessary, we decline to address whether the trial court abused its discretion in departing from the guidelines.

Finally, defendant argues that he was denied due process by the prosecutor's misconduct at trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Even if there was error, the error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative, and defendant bears the burden of

demonstrating that such an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant raises numerous allegations of prosecutorial misconduct, none of which require reversal. Defendant claims that the prosecutor continuously attempted to improperly solicit hearsay testimony that was continuously objected to by defense counsel. However, a finding of misconduct may not be based on a prosecutor's good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A review of the entire record shows that, while the trial court did sustain several of defense counsel's objections, the prosecutor's questions were asked in a good faith attempt to admit evidence. There is no evidence the prosecutor's conduct denied defendant a fair trial.

Defendant claims that the prosecutor improperly questioned witnesses and attempted to question witnesses about the emotional state of other witnesses. Defendant also claims that the prosecutor mischaracterized testimony and attempted to argue facts not in evidence. However, many of the questions asked were an attempt by the prosecutor to admit evidence. Again, while many of defense counsel's objections were sustained by the trial court, defendant has not shown the requisite prejudice to require reversal.

Defendant also claims that the prosecutor failed to follow proper procedure in preserving evidence. From a review of the record, it appears that the prosecutor may have been somewhat inexperienced at some aspects of trial procedure. However, defendant has not argued that any evidence was improperly admitted because of the prosecutor's conduct. Defendant has not shown he was prejudiced by the fact that the jury heard or saw evidence before the appropriate steps for admission were complete. Therefore, reversal is not warranted on this basis.

Finally, defendant claims that the prosecutor committed numerous acts of misconduct during closing arguments. Defendant admits on appeal that defense counsel did not object to any of this alleged misconduct. Appellate review is precluded if the defendant failed to timely object unless an objection could not have cured the error or a failure to review would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely objection. *Watson*, *supra* at 586.

Defendant asserts the prosecutor improperly argued facts not in evidence. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to the prosecutions' theory of the case, *Schutte*, *supra* at 721, and a prosecutor need not use the least prejudicial evidence available to establish a fact at issue or state the inferences in the blandest terms possible, *Aldrich*, *supra* at 112. Here, the prosecutor's arguments were based on inferences from the evidence presented. We find no error. Moreover, any error could have been cured by a timely objection and instruction; thus, any error does not require reversal.

Defendant asserts that the prosecutor improperly attacked defendant's credibility and accused defendant of lying and tailoring his testimony to the other testimony received at trial. However, a prosecutor's comment in closing argument that a defendant's presence at trial gives the defendant the opportunity to fabricate or conform his testimony does not constitute error warranting reversal, but instead may be proper comment on credibility. *People v Buckey*, 424

Mich 1, 14-16; 378 NW2d 432 (1985). Further, most of the prosecutor's arguments were in response to theories raised by defense counsel, and thus, were proper. *Watson*, *supra*.

Defendant also asserts that the prosecutor attempted to infer that she had personal knowledge of the facts. However, defendant takes the prosecutor's comments out of context, and a reading of the statements in context demonstrates that the prosecutor did not infer that she had personal knowledge, but instead argued what the evidence demonstrated. Regardless, any error could have been cured by a timely objection.

This was a hotly contested and emotional trial. While defendant makes many assertions of error on the part of the prosecutor, and many of defense counsel's objections to the prosecution's conduct at trial were sustained, on appeal, defendant fails to demonstrate that he was prejudiced by any of the errors in that reversal is required. Regardless of any errors, after a review of the entire case, it does not affirmatively appear more probable than not that any of the alleged errors were outcome determinative.

We affirm defendant's conviction, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Jessica R. Cooper